

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7600

Investigation into (1) whether Entergy Nuclear)
Vermont Yankee, LLC, and Entergy Nuclear)
Operations, Inc. (collectively, "Entergy VY"),)
should be required to cease operations at the)
Vermont Yankee Nuclear Power Station, or take)
other ameliorative actions, pending completion)
of repairs to stop releases of radionuclides,)
radioactive materials, and, potentially, other)
non-radioactive materials into the environment;)
(2) whether good cause exists to modify or)
revoke the 30 V.S.A. § 231 Certificate of Public)
Good issued to Entergy VY; and (3) whether)
any penalties should be imposed on Entergy VY)
for any identified violations of Vermont statutes)
or Board orders related to the releases)

Order entered: 4/19/2010

ORDER RE: ATTORNEY'S FEES AND COSTS

I. INTRODUCTION

In this Order, the Vermont Public Service Board ("Board") considers whether Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (jointly, "Entergy VY"), should be ordered to pay the attorney's fees and costs incurred by the Vermont Public Interest Research Group ("VPIRG"), the New England Coalition Inc. ("NEC") and the Windham Regional Commission ("WRC"). For the reasons discussed herein, we deny all three of these requests for relief in this docket.

We emphasize that our Order today in Docket 7600 does not in any way reflect on the resolution of any requests for attorney's fees and costs that have been filed or may yet be filed in Docket 7440, which deals with the pending request of Entergy VY for relicensing of the Vermont

Yankee Nuclear Power Station ("Vermont Yankee"). These two dockets are separate proceedings, driven by different operative facts and legal frameworks, and therefore potentially warranting different resolutions with respect to attorney's fees and costs.

II. PROCEDURAL HISTORY

On February 25, 2010, the Board opened this docket to investigate whether (1) Entergy VY should be required to cease operations at Vermont Yankee, or take other ameliorative actions, pending completion of repairs to stop releases of radionuclides, radioactive materials, and, potentially, other non-radioactive materials into the environment; (2) whether good cause exists to modify or revoke the Certificate of Public Good ("CPG") that the Board issued to Entergy VY pursuant to 30 V.S.A. § 231 on June 13, 2002, in Docket No. 6545, and (3) whether any penalties should be imposed on Entergy VY for any identified violations of Vermont statutes or Board orders related to those releases.¹

On March 10, 2010, the Board convened a prehearing conference in this docket. At that hearing, VPIRG requested that Entergy VY be ordered to pay the legal and other fees of intervenors arising from Entergy VY's misrepresentations in Docket 7440 regarding the existence of underground piping at Vermont Yankee.

On March 18, 2010, the Board issued a procedural Order stating that any party seeking reimbursement for its costs in this docket from Entergy VY must file a motion explaining why such relief should be granted.² That same day, WRC filed a Motion for Reimbursement of Expenses.³

On March 19, 2010, VPIRG filed a Motion for Sanctions that included a request for an award of staff costs, attorney's fees and costs.⁴

1. Docket 7600, Order of 2/25/10 at 1.

2. Docket 7600, Order of 3/18/10 at 5 (hereinafter the "Procedural Order").

3. Hereinafter the "WRC Motion."

4. Hereinafter the "VPIRG Motion."

On March 26, 2010, NEC filed a Motion for Payment of Attorney's Fees and Costs of Litigation.⁵

On March 29, 2010, Entergy VY filed a memorandum opposing the WRC Motion and the VPIRG Motion.⁶

On April 5, 2010, Entergy VY filed a memorandum opposing the NEC Motion.⁷

III. BOARD DISCUSSION AND CONCLUSIONS

Our consideration of the motions filed by WRC, VPIRG and NEC begins with a review of our authority to grant the relief they have requested.

By law, the Board is vested with "the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction." 30 V.S.A. § 9. We have previously construed this statutory grant of authority to mean that we have the power "to award attorney's fees in litigation that is properly before us in the same manner as a Vermont court would be authorized to award attorney's fees."⁸ We have exercised this power sparingly, in recognition of the American Rule, which is followed in Vermont, and which holds that attorney's fees generally are not awarded absent statutory authority or an enforceable contractual

5. This motion was imbedded at pages 5 and 9-11 of a pleading entitled *New England Coalition Inc's Response to VPIRG's Motion for Sanctions and Motion for Additional Sanctions and for Payment of Attorney's Fees and Costs* (hereinafter "NEC Motion"). We note that the NEC Motion bears a double caption of Docket 7440 and Docket 7600, and that the NEC Motion also contains a request for an award of attorney's fees and costs in Docket 7440. NEC Motion at 5-9. That portion of the NEC Motion will be addressed in a separate order in Docket 7440.

We take this opportunity to remind the parties that these two dockets have not been consolidated. Accordingly, the parties should clearly distinguish in their filings between Docket 7440 and Docket 7600 by using only one docket caption to identify the proceeding in which they intend to make a formal filing of record.

6. This memorandum filed by Entergy VY is entitled *Memorandum in Opposition to Request of Windham Regional Commission and the Vermont Public Interest Research Group for Reimbursement* (hereinafter cited as "Entergy VY Response I").

7. This memorandum filed by Entergy VY is entitled *Memorandum in Opposition to the New England Coalition Inc's Motion for Additional Sanctions and for Payment of Attorney's Fees and Costs* (hereinafter cited as the "Entergy VY Response II").

8. Docket 6860, *Petition of Vermont Electric Power Company, Inc., and Green Mountain Power Corp. for a certificate of public good authorizing VELCO to construct the Northwest Vermont Reliability Project*, Order of 9/26/06 at 2.

agreement.⁹ However, as other courts do,¹⁰ it has been our practice to depart on occasion from the American Rule and to award attorney's fees in exceptional circumstances, such as when a discovery sanction is warranted,¹¹ or when it is appropriate to off-set the additional litigation costs incurred by one party in responding to another party's untimely or inefficient actions in presenting its case.¹²

In the Procedural Order, we stated that if a party in this docket files a motion seeking costs based on the misrepresentations that Entergy VY has admitted to in Docket 7440, then that movant "must demonstrate that the need for compensation for costs associated with the subject matter of the initial stage of this investigation — whether the Board should take action due to the leaks at Vermont Yankee — arises from those misrepresentations."¹³ With this standard in mind, we now review the WRC Motion, the VPIRG Motion, and the NEC Motion.

The WRC Motion

In its motion, WRC explains that due to impending staff changes and severe budgetary constraints, as well as the unforeseen nature of this proceeding, WRC does not have the requisite resources to bear the expenses "directly related to participation in this docket . . ."¹⁴ WRC maintains that these expenses would include "WRC staff time preparing for and attending Board hearings and related meetings, beginning with the January 27 status conference in Docket No.

9. *In re Appeal of Gadhue*, 149 Vt. 322, 327 (1988).

10. *Id.*

11. Docket 6812, *Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. Pursuant to 30 V.S.A. Sec. 248 for Certificate of Public Good to modify certain generation facilities*, Order of 10/7/03 at 8.

12. *See, e.g.*, Docket 6860, Order of 9/26/06 at 5-6; Docket 6300, *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station and related transactions*, Order of 12/15/00 at 9-11.

13. Procedural Order at 5.

14. WRC Motion at 2.

7440; commissioner and staff travel, meal and lodging costs associated with those hearings or meetings; and consulting costs if and as needed."¹⁵

Entergy VY counters that it is not the Board's practice to provide funding for the litigation expenses of intervenors, and the WRC has failed to cite to "a statutory basis under which the Board can fund intervenors."¹⁶ Entergy admits the Board has discretion to award attorney's fees in certain situations, but maintains that none of the Board's precedents for such awards apply to WRC's circumstances in this case.¹⁷ Finally, Entergy argues that WRC has failed to demonstrate that "its need for prospective funding of costs in this docket is the result of alleged misrepresentations by Entergy VY" in Docket 7440.¹⁸

While WRC has clearly described the financial burden it is facing to participate in this docket, the WRC Motion does not demonstrate a causal connection between the misrepresentations made by Entergy VY in Docket 7440 and the expenses WRC expects to incur in litigating the initial stage of this docket, which is an investigation dealing with the leaks at Vermont Yankee. In this docket, we have granted WRC permissive intervenor status, and as such, WRC is a voluntary participant. It therefore follows that WRC is voluntarily incurring the expense of its participation in this proceeding. Accordingly, we conclude there is no basis for granting WRC's request for attorney's fees and costs. The WRC Motion is denied.¹⁹

The VPIRG Motion

As an initial matter, we observe that in seeking an award of "past and future staff costs, attorneys fees and costs," the VPIRG Motion cites to a variety of procedural rules governing the process of discovery as a basis for granting this relief.²⁰ We therefore conclude that it is

15. *Id.*

16. Entergy Response I at 1-3.

17. *Id.*

18. *Id.* at 4.

19. We note that in denying WRC's request for attorney's fees and costs in this docket, we have expressed no judgment regarding any request for reimbursement that WRC may choose to make in Docket 7440.

20. VPIRG Motion at 1. As in the case of the NEC Motion, the VPIRG Motion bears the double caption of Docket 7440 and Docket 7600. We therefore assume that VPIRG's request for an award of "past . . . staff costs,

appropriate to treat the VPIRG Motion as a request for an order imposing sanctions upon Entergy VY for discovery violations.²¹

In its motion, VPIRG asserts that the "materially false information" provided by Entergy VY in Docket 7440 "about the existence of underground pipes carrying radioactive material and the apparent deteriorating condition of those pipes has kept VPIRG and other parties from fully investigating the reliability of the plant."²²

In response, Entergy VY contends that VPIRG has failed to demonstrate a causal link between statements and filings by Entergy VY in Docket 7440 and the initial phase of the inquiry underway in this docket as to what action, if any, the Board should take to deal with the leaks at Vermont Yankee.²³

In the Procedural Order, we specified the issues to be examined in this docket. We explained that the initial stage of this investigation will focus on whether we can take action and what action we should take in response to the "unpermitted releases of radionuclides, radioactive materials, and, potentially, other non-radioactive materials into the environment."²⁴ VPIRG has provided no substantive argument that the subject matter of our early focus in this investigation is causally connected to VPIRG's concern that it has been prevented from investigating the reliability of Vermont Yankee as a result of Entergy VY's failure to disclose the existence and "apparent deteriorating condition" of underground piping at that facility. To the extent that VPIRG may have been wrongfully foreclosed by Entergy VY from investigating the reliability of Vermont Yankee, we conclude that any such prejudicial act occurred in the context of discovery

attorney's fees and costs" is a reference to litigation expenses it incurred in Docket 7440.

21. Of the several rules cited by VPIRG, the only citations relevant to this docket appear to be the citations to Vermont Rule of Civil Procedure 37 (discovery sanctions) and Board Rule 2.214 (incorporating V.R.C.P. 37 into discovery practice before the Board). The remaining citations deal with amendments to pleadings, and therefore appear only relevant to arguments in the VPIRG Motion that pertain to Docket 7440. One exception is VPIRG's reference to V.R.C.P. 26(j), which would appear to be a scrivener's error, as the Vermont Rules of Civil Procedure contain no such rule.

22. *Id.* at 5.

23. Entergy VY Response I at 4.

24. Procedural Order at 2.

and technical hearings in Docket 7440, and is therefore best addressed and remedied in that proceeding.²⁵ The investigation now underway in this docket pertaining to the leaks at Vermont Yankee is still in its early stage, where discovery has barely begun. Therefore, it would be inappropriate to grant VPIRG's request for discovery sanctions in the form of future attorney's fees and costs.

For the reasons stated above, the VPIRG Motion is denied.

The NEC Motion

As in the case of WRC, NEC is voluntarily incurring litigation expenses as a permissive intervenor in this docket. In its motion, NEC maintains that an order awarding attorney's fees and costs would be appropriate because this docket would not have been necessary had Entergy VY "been forthcoming with information regarding underground piping at Vermont Yankee."²⁶ Unlike WRC, NEC attempts to draw a causal connection between the misrepresentations made by Entergy VY in Docket 7440 and the expenses NEC expects to incur by participating as a litigant in this docket in which we are investigating the leaks at Vermont Yankee. Specifically, NEC asserts that but for Entergy VY's misleading statements about underground piping at Vermont Yankee, "a program might have been put in place over the past several years to remedy any deficiencies in the underground pipes, which may have prevented leaks from occurring."²⁷ Thus, according to NEC, this docket (and NEC's participation in it) could have been avoided had Entergy VY "provided the Board and the parties with the information necessary to address underground pipes before they became a danger to Vermont."²⁸

25. To the extent that VPIRG is seeking sanctions – in particular, attorney's fees and costs – related to Entergy VY's conduct in Docket 7440, that portion of the VPIRG Motion will be addressed in a separate order in Docket 7440. Entergy VY Response I bears only one caption -- Docket 7600. In that filing, Entergy VY observes that it has asked the Board "to defer action on VPIRG's Motion for Sanctions in Docket No. 7440 . . ." and further states that it "will address the other bases for the sanctions, including dismissal with prejudice, sought in VPIRG's motion in that docket." Entergy VY Response I at p.5 fn. 3. We therefore presume that Entergy VY will make a filing in due course in Docket 7440 that responds to VPIRG's request for attorney's fees and costs as set forth in the VPIRG Motion.

26. NEC Motion at 9.

27. *Id.*

28. NEC Motion at 10.

As in its opposition to the WRC Motion, Entergy VY argues that there is neither statutory nor legal authority for granting attorney's fees and costs to NEC, and that "it has never been the Board's practice to provide prospective intervenor funding except in narrow circumstances not present here."²⁹ In response to NEC's argument that this docket is the result of a lost opportunity to institute an underground pipe monitoring program because Entergy VY failed to disclose the presence of such pipes at Vermont Yankee, Entergy VY submits that NEC "does not support these assertions . . . with any substantiated facts."³⁰

We do not find NEC's argument persuasive. Assuming Entergy VY had disclosed the presence of the underground pipes at issue, and if, as a result, a monitoring program had been put in place, we have no basis for assuming that the monitoring program would have been effective, thereby obviating the need for this investigation. At best, NEC's argument amounts to a ladder of speculation, and not a chain of causation that would justify our making an exception to the American Rule requiring parties to bear their own litigation costs in the absence of a statute or a contractual agreement to the contrary. The NEC Motion is denied.

SO ORDERED.

29. Entergy VY Response II at 2.

30. *Id.*

Dated at Montpelier, Vermont, this 19th day of April, 2010.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
)	

OFFICE OF THE CLERK

FILED: April 19, 2010

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

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